

1 My view of Commission law is they don't have to
2 provide you with these documents you requested until the
3 hearing stage.

4 MR. GORDIN: Well, if we requested the documents
5 through FOIA, could Your Honor enter an order that any
6 documents that are, that there not be any delay
7 after -- that we get those documents after ten days which is
8 the time the Bureau or the Commission has to respond to a
9 FOIA request I believe?

10 MR. SCHONMAN: Your Honor, I think that the FOIA
11 by its very nature is a statute, a federal statute. And I'm
12 not sure that Your Honor has the delegated authority to
13 waive the response times for a federal statute.

14 In fact, the request for documents under FOIA is
15 not discovery at all. It's an entirely separate portion of
16 the rules. And Mobilemedia could have come in at any time
17 prior to the issuance of your order and filed a FOIA request
18 for the same information. And when and if they decide to
19 file a FOIA request seeking these documents, the responding
20 individual will respond accordingly, consistent with the
21 Commission's rules on FOIA. No differently.

22 JUDGE CHACHKIN: Again, it seems to me that
23 material gathered in the course of investigation for a
24 hearing is an exception to the FOIA. I mean, I'm just
25 speaking generally off the cuff, but I think that's the

1 rule. So I don't think you would get this material under
2 FOIA.

3 MR. GORDIN: Well, Your Honor, it would seem that
4 if the Commission now wants to go forward with depositions,
5 we cannot thoroughly participate in those depositions if
6 documents are withheld.

7 Now, Your Honor, mentioned that we should get
8 exculpatory documents and documents able to examine
9 witnesses. To the extent that those documents relate to any
10 depositions, it would seem just basic notions, the fairness
11 of due process, would require that we get them then. We
12 can't effectively be an advocate. We can't effectively
13 defend or depose if in fact we don't have the information.
14 To the extent documents, therefore, relate to the witnesses
15 testimony or prior statements by the witness, I would ask at
16 a minimum that we be provided those.

17 JUDGE CHACHKIN: I think that's reasonable. To
18 the extent to which you depose any individuals and you have
19 prior statements of that witness or prior depositions of
20 that witness, I think this should be produced at the time of
21 the deposition or shortly before the deposition so that
22 Mobilemedia would be in a position to ask questions of that
23 witness.

24 MR. SCHONMAN: Your Honor, I would submit that we
25 would turn over any such information at such time that the

1 individual testifies at the hearing. But we may depose
2 people who we may decide not to have as witnesses at the
3 hearing.

4 JUDGE CHACHKIN: Well, do you plan on deposing any
5 of the individuals listed, included in this list here?
6 People you've already taken depositions of. That's what
7 we're talking about here.

8 MR. SCHONMAN: Your Honor, it is not likely we'll
9 depose any of the people who we've already spoken with.

10 JUDGE CHACHKIN: Well, I'm directing if you do
11 depose any of these people that you've already taken
12 depositions of that Mobilemedia be provided with prior
13 depositions of those individuals.

14 MR. SCHONMAN: Very well, Your Honor.

15 MR. GORDIN: Your Honor, may we also to the extent
16 depositions are taken of people whom they have documentation
17 that would be exculpatory in nature or be favorable to
18 Mobilemedia on the issue of candor and current
19 qualifications, could we receive that information as well?

20 MR. SCHONMAN: Your Honor, I have to object to
21 this chipping away. Your Honor has already ruled and the
22 Bureau has agreed to provide a certain amount of material.
23 But I'm going to have to object to any further requests for
24 documents that are not filed pursuant to a FOIA request.

25 JUDGE CHACHKIN: What we're talking about here,

1 we're talking about -- the only universe we're talking about
2 here, persons that you propose to depose. If you have with
3 respect to those individuals, prior writings of that
4 individual, then I think it's fair and reasonable that you
5 provide that information prior to the deposition so we can
6 have a deposition detained, full opportunity to ask
7 questions. That's what we're limiting it to.

8 MR. SCHONMAN: And the Bureau has agreed to that.

9 MR. MASTANDO: I would request, Your Honor, that
10 we would exclude from that list of documents any documents
11 that Mobilemedia has already provided to us.

12 JUDGE CHACHKIN: Well, of course. Then there's no
13 reason to and you can -- obviously, you don't have to
14 provide documents to them that they already have. There's
15 no point to that.

16 MR. GORDIN: Yeah. Would that be diagrams two or
17 from exculpatory documents involving that particular witness
18 that they've decided to depose?

19 JUDGE CHACHKIN: Mobilemedia already has those
20 documents. Obviously, there's no need to provide you with
21 an additional copy of that document.

22 MR. GORDIN: I misspoke. I agree. If we have the
23 document, we're not asking. If they have a document that
24 they have reason to believe we have that's exculpatory or
25 that's favorable to Mobilemedia with regard to a particular

1 witness written to the witness, received by the witness, if
2 we could receive those documents so that we can effectively
3 participate in the deposition.

4 JUDGE CHACHKIN: And I've indicated that --

5 MR. GORDIN: And at the hearing.

6 JUDGE CHACHKIN: And I've indicated that with
7 respect to any individuals to be deposed, any prior
8 writings, exculpatory or otherwise, should be provided prior
9 to taking of the deposition.

10 MR. SCHONMAN: Very well, Your Honor.

11 JUDGE CHACHKIN: So to that extent, I'm willing to
12 grant your document request. The rest of the material will
13 just have to wait for the hearing stage for you to get the
14 material.

15 Now, in order to move the thing along, obviously,
16 if you intend to poll a witness, they have a right prior to
17 cross examination under the Commission's rules to examine
18 any prior writings, prior interviews, whatever you have with
19 respect to that witness.

20 MR. SCHONMAN: Yes, Your Honor.

21 JUDGE CHACHKIN: And I would suggest that you
22 don't wait to give it to him until the time when cross
23 examination is to begin because I would then have to delay
24 the hearing to afford them an opportunity to review that
25 material.

1 MR. SCHONMAN: I understand, Your Honor. So it
2 seems to me at the time that you list your witnesses, you
3 should provide them with any prior writings of that prior
4 interviews or statements of that witness.

5 MR. PETTIT: Your Honor, I might just note
6 although it's been a while with any authority on the FOIA,
7 but it strikes me that under FOIA there is no absolute bar
8 to the production of documents. They may be provided
9 voluntarily by the government.

10 JUDGE CHACHKIN: Oh, of course.

11 MR. PETTIT: So if Mr. Schonman has any second
12 thoughts about that, we're certainly happy to have what
13 documents he would provide.

14 MR. GORDIN: Your Honor, may I also ask, and I
15 don't believe this is --

16 MR. SCHONMAN: I apologize, but I was talking with
17 my colleague for a moment when Mr. Pettit was speaking
18 and --

19 JUDGE CHACHKIN: Well, Mr. Pettit says there's
20 nothing preventing you from voluntarily furnishing documents
21 if you wish.

22 MR. SCHONMAN: That's very true. There isn't
23 anything to prevent us. That's right.

24 JUDGE CHACHKIN: So hopefully, in the spirit of
25 getting this matter behind us, we may be willing to furnish

1 these documents.

2 MR. SCHONMAN: Your Honor, I would also request
3 that in terms of providing documents that any documents that
4 Mobilemedia might have which would tend to show evidence of
5 misconduct or culpability by any individuals who are deposed
6 or who appear as witnesses that be provided with that same
7 information.

8 JUDGE CHACHKIN: I'm sure the same rule will hold
9 and I'm sure Mobilemedia will be willing to provide such
10 documents.

11 MR. PETTIT: I'm fairly sure we already have, Your
12 Honor.

13 JUDGE CHACHKIN: But the extent to which you find
14 additional evidence, I assume you'd provide it.

15 MR. PETTIT: Well, we would certainly provide it.
16 Absolutely.

17 MR. GORDIN: Your Honor, with regard to the issue
18 under paragraph 14(b) of the hearing designation order, we
19 would ask, and I think as both a due process and an ethical
20 matter, that the Bureau people at least review their notes
21 to determine what information they had and when they had it
22 regarding Mr. Witsaman.

23 And it seems to me that ethically if they knew
24 that we had provided information from which they were aware
25 of when Mr. Witsaman and other persons had information which

1 has been indicated in the order was in fact not provided
2 when in fact it was.

3 And it seems to me ethically that issue should be
4 removed from the case. And as both officers of the Court
5 and officers of the federal government that they should --
6 this is not a game. Therefore, they should search their own
7 files for that information and let us know if any such
8 information exists. I'm not asking for documents to be
9 wholesale turned over. But I think for the reasons that I
10 stated, that procedure should occur.

11 MR. SCHONMAN: Your Honor, I'm not exactly clear
12 what it is counsel is asking us to do. There's an issue
13 here and he's asking for it to be deleted. I think.

14 MR. GORDIN: No, I'm not.

15 MR. SCHONMAN: I'm not exactly sure what he wants
16 the Bureau to do. Does he want to serve interrogatories?
17 Does he want to do a FOIA request and ask for documents?

18 JUDGE CHACHKIN: What are we talking about? Are
19 we talking about Mr. Witsaman? Are we talking about item
20 five? Is that what we're talking about here of this
21 document request?

22 MR. GORDIN: Yes, there is an indication that
23 somehow, even though Mr. Witsaman is mentioned throughout
24 the documents attached to October 15 as was correctly
25 pointed out, in the document that we provided on October 15,

1 names weren't fully used.

2 But there was a lot of communications going on
3 both before and after October 15th. And we don't believe
4 there was anything misleading that was in the report. We
5 don't believe we've done anything misleading.

6 And what we're suggesting is that we shouldn't be
7 here fighting about whether there was anything misleading
8 regarding Mr. Witsaman. And if in fact it turns out among
9 other things that the Bureau has notes showing conversations
10 with us or with somebody else that we provided about
11 Mr. Witsaman.

12 I mean, it seems to me you can't go forward and
13 say you didn't tell us when in fact in your notes it says
14 Mr. So and So told us, but we're not going to provide the
15 notes. It seems just to be a basic notion of fairness that
16 they should just take a look and see what it shows. And all
17 I'm asking is it shows obviously that they did receive this
18 information and that should come out. At least that should
19 come out -- that issue would be resolve.d It wouldn't be
20 deleted. On that basis alone.

21 I think there's a lot of other grounds that the
22 issue will be resolved on as well. But we need not spend
23 hearing time on those grounds.

24 MR. SCHONMAN: Your Honor, again, I still don't
25 understand what counsel is seeking. If he's asking for

1 information which will lead to a motion for summary decision
2 for the issue at paragraph 14(b), now doesn't seem the time
3 and place to seek that.

4 You know, the issue has been designated by the
5 Commission and we will try it accordingly. Unless the
6 Commission in its wisdom decides to delete or modify or
7 clarify, I haven't seen the order that was handed down
8 yesterday, but perhaps that will provide additional
9 information.

10 JUDGE CHACHKIN: Go ahead and show it to you now
11 if you want to show it him. Basically, what the Commission
12 says is that the issue is crystal clear. And the
13 Commission's reference to all persons is clear. The
14 Commission did not limit to Mobilemedia's principles its
15 inquiry into the facts and circumstances surrounding
16 Mobilemedia's report. Moreover, the Bureau has provided no
17 reason to so limit the inquiry.

18 Although the content and intent of Mobilemedia's
19 principles would be the most relevant consideration in
20 determining the ultimately question of Mobilemedia's
21 qualifications, the nature and extent of participation by
22 others (including outside counsel) in the preparation of the
23 report, including their intent, is also relevant to creating
24 a full record of the facts and circumstances bearing on this
25 question.

1 MR. GORDIN: It seems to me that outside counsel
2 communications with the Bureau, to the extent the Bureau has
3 notes on these very subjects. This isn't a game. I mean,
4 it's a matter of ethics.

5 To the extent that their notes reflect those
6 conversations and show when the information, when their
7 notes at least start showing that they have this
8 information. It seems to me that's a matter, this is a
9 serious matter and it's not a hide the ball situation.

10 They should take a look to the extent we're
11 dealing with counsel to counsel. They want to be advocates,
12 but they're also now in a situation of having been in the
13 discussion then. I mean, maybe we should take their
14 depositions.

15 It seems to me that one way or another, this isn't
16 a -- we haven't see the order. So we don't know how we want
17 to proceed with this. But this is not something about, if
18 re's something there, it can't be hidden.

19 JUDGE CHACHKIN: Well, the Commission has already
20 said in their designation, they've identified one individual
21 they say who was not included or apparently was not
22 considered to be a high enough official. They're talking
23 about here, I'm talking about paragraph ten. And where the
24 company -- the report concerned the company's claim that had
25 terminated the employment of a responsible senior management

1 personnel. And none of the senior management involved in
2 derelictions, either directly as a matter of responsibility
3 to the main employee.

4 And the Commission says this representation does
5 not appear to be accurate. The Bureau's investigation found
6 that at least one corporate officer was fully aware of the
7 deceitful activities and apparently involved in the matter
8 of responsibilities still holds his high rank and position
9 with Mobilemedia.

10 It then points out in its report, Mobilemedia
11 failed to identify this individual as a corporate officer,
12 implying that he was one of the lower level employees. And
13 then the Commission says there was a further submission on
14 January 31st, 1997 and this submission does not explain the
15 reports failure to fully disclose the role of this officer
16 and admitted wrongdoing.

17 So that's the example the Commission cites why
18 it's necessary to examine and make sure that all the
19 individuals who are involved in any wrongdoing was
20 identified and also -- and questions about the report
21 itself, the credibility of the report itself. That's what
22 the --

23 MR. PETTIT: Your Honor, I do want to point out
24 that I know this is not the place to get into this. But our
25 motion to delete will show I hope to the Commission's

1 satisfaction that the factual basis for that issue are
2 simply wrong.

3 JUDGE CHACHKIN: That's something the Commission
4 will have to decide. I believe on the hearing designation,
5 the motions to lead go to the Commission.

6 MR. GORDIN: Yes, Your Honor.

7 MR. PETTIT: That's correct. Your Honor, should we
8 follow those directly or follow them to you to be certified?

9 JUDGE CHACHKIN: No, if it's directed, if it says
10 in the order to whom the -- who is going to act on the
11 motions and specifically motion of a large change of delete
12 issues and motion for summary decision, I would assume go
13 directly to the Commission.

14 MR. PETTIT: We'll be happy to --

15 JUDGE CHACHKIN: There's no need for me to certify
16 it.

17 MR. PETTIT: Very well. We'll be happy to serve
18 the Commission with a copy certainly.

19 JUDGE CHACHKIN: Yes. Well, I don't know. It
20 does say I'm supposed to certify. So I guess you file it
21 with me and I certify it to the Commission.

22 MR. PETTIT: Very well.

23 JUDGE CHACHKIN: All right. Well, I don't know if
24 we're going to get a satisfactory answer to your question.
25 All I assume is whatever information the Bureau has,

1 exculpatory or otherwise, will come out at some point. I
2 don't know if that satisfies -- answers your question. I
3 assume you're going to get together with the Bureau and go
4 over these issues, perhaps work out stipulations. And the
5 extent that the Bureau has evidence which just provides a
6 stipulation of fact, that evidence will be shown to you so
7 you can stipulate to it. But I think that's up to the
8 parties to get together and work on. Nothing I can rule on
9 here. Since I don't know what the Bureau has and I haven't
10 looked at any of the reports. So I'm in the dark. Anything
11 else the parties want to take up?

12 MR. SCHONMAN: No, Your Honor.

13 MR. PETTIT: I don't think so.

14 JUDGE CHACHKIN: Do you have anything else you
15 want to take up?

16 MR. PETTIT: I don't think so, Your Honor.

17 JUDGE CHACHKIN: Again, let me just emphasize that
18 I'm available, recognizing the need to expedite this matter.
19 I'm available if there's any disagreements with the parties
20 have to be resolved, I'm available for a conference,
21 informal or formal. And I intend to keep to the dates that
22 the Commission has established. The only area which I'm
23 willing to be flexible on is as far as discovery is
24 concerned, as long as it doesn't interfere with the hearing
25 itself. In other words, the hearing is scheduled for

1 June 10th and I intend to go forward on that date with the
2 hearing.

3 MR. PETTIT: We intend to as well, Your Honor, not
4 withstanding any motions as we discussed regarding our
5 emergency motion to stay. We are preparing and will be
6 prepared.

7 JUDGE CHACHKIN: All right. Just for the record,
8 let me indicate that I'll grant the motion for special
9 relief to the extent indicated, namely the first request.
10 Anything else?

11 MR. SCHONMAN: No, sir.

12 JUDGE CHACHKIN: All right. We're in recess now.
13 Thank you.

14 (Whereupon, at 10:20 a.m. the hearing was
15 adjourned.)

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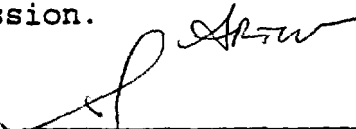
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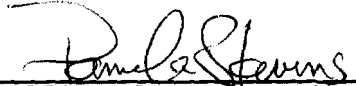


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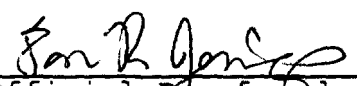


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